

Comsa Farms Bhd v Malaysian Assurance Alliance Bhd (No 2) A

HIGH COURT (KUALA LUMPUR) — SUIT NO D4-22-1200 OF 2007
HAMID SULTAN J
17 MAY 2012

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Civil Procedure — Striking out — Want of prosecution — Application to strike out action for want of prosecution — Whether plaintiff guilty of inordinate and inexcusable delay in prosecuting its action — Whether delay amounted to abuse of process — Rules of the High Court 1980 O 34

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On 10 August 2007, the plaintiff filed a writ action against the defendant. The plaintiff then applied for an interlocutory injunction to restrain the defendant from dealing with lands charged to the defendant as security for a loan to the plaintiff. The application for an interlocutory injunction was dismissed on 13 November 2008. Thereafter, the plaintiff neither sought case management directions to set down the matter for trial nor obtained a stay of proceedings for any legitimate reasons. Subsequently, the plaintiff was wound up on 3 December 2009. This was the defendant's application to strike out the plaintiff's action for want of prosecution. The defendant submitted that the inordinate and inexcusable delay on the plaintiff's part had caused serious prejudice to the defendant.

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Held, allowing the application with no order as to costs:

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- (1) After the plaintiff's application for an interlocutory application was dismissed, it had the option of proceeding with case management and setting the matter down for trial or applying for a stay of proceedings. The taking of such steps would be within the spirit and intent of O 34 of the Rules of the High Court 1980 ('RHC'), which required an action to be justly, expeditiously and economically disposed of. However, in the instant case the plaintiff had not taken both steps or given any reasons for not doing so. Thus, in the instant case the court was in agreement with the defendant that the plaintiff had been guilty of inordinate and inexcusable delay in prosecuting its action and that this delay had caused serious prejudice to the defendant (see para 5).
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H- (2) In the Malaysian context, all solicitors are aware of the tracking system and the obligation for the court as well as the parties to justly, expeditiously and economically dispose of the case. In the light of O 34 of the RHC, the undertaking of the Chief Justice to the public, and the present fast tracking system, any form of delay in prosecuting an action would be seen to be an abuse of process of court. In addition, the plaintiff
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A had not demonstrated that it had made all reasonable attempts to prosecute this action. The delay also showed that the plaintiff had no intention of bringing the action to a conclusion. In such circumstances, the delay amounted to an abuse of process and the action ought to be dismissed in exercise of the court's inherent jurisdiction (see para 7).

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[Bahasa Malaysia summary]

Pada 10 Ogos 2007, plaintif memfailkan tindakan writ terhadap defendan. Plaintif kemudiannya memohon untuk injuksi interlokutari untuk menghalang defendan daripada berurusan dengan tanah-tanah yang dicaj kepada defendan sebagai jaminan untuk pinjaman kepada plaintif. Permohonan untuk injuksi interlokutari ditolak pada 13 November 2008. Plaintif kemudiannya tidak memohon untuk arahan pengurusan kes untuk menyelesaikan kes perkara ini ataupun memperolehi penangguhan prosiding untuk apa-apa alasan sah. Plaintif kemudiannya digulung pada 3 Disember 2009. Ini adalah permohonan defendan untuk membatalkan tindakan plaintif untuk pendakwaan. Defendan berhujah bahawa kelewatan terlampau dan tidak dapat dimaafkan oleh pihak plaintif telah menyebabkan prejudis serius kepada defendan.

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Diputuskan, membenarkan permohonan tanpa perintah kepada kos:

- (1) Selepas permohonan plaintif untuk permohonan interlokutari ditolak, ia mempunyai opsyen prosiding dengan pengurusan kes dan menetapkan perkara tersebut untuk perbicaraan atau memohon untuk penangguhan prosiding. Dengan mengambil langkah sedemikian akan menjadi dalam kekuatan dan niat A 34 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), yang memerlukan tindakan yang adil, cepat dan cekap dan termasuk secara segera. Walau bagaimanapun, dalam kes ini plaintif tidak mengambil kedua-dua langkah tersebut atau memberi apa-apa alasan untuk tidak berbuat demikian. Oleh itu, dalam kes ini mahkamah bersetuju dengan defendan bahawa plaintif bersalah terhadap kelewatan terlampau dan tidak dapat dimaafkan dalam menjalankan tindakannya dan bahawa kelewatan ini telah menyebabkan prejudis serius kepada defendan (lihat perenggan 5).
- (2) Dalam konteks Malaysia, kesemua peguam tahu mengenai sistem pengesanan dan tanggungjawab untuk mahkamah dan juga pihak-pihak kepada adil, cepat dan cekap dan secara segera mendengar kes tersebut. Berdasarkan A 34 KMT, janji Ketua Hakim Negara kepada orang awam, dan sistem pengesanan pantas masa ini, apa-apa bentuk kelewatan dalam melaksanakan tindakan akan dilihat sebagai penyalahgunaan proses mahkamah. Selanjutnya, plaintif tidak menunjukkan bahawa ia telah membuat kesemua percubaan munasabah untuk melaksanakan tindakan ini. Kelewatan juga menunjukkan bahawa plaintif tidak berniat untuk menyelesaikan tindakan ini. Dalam keadaan ini, kelewatan merupakan

penyalahgunaan proses dan tindakan patut ditolak dalam melaksanakan bidang kuasa inherens mahkamah (lihat perenggan 7).]

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Notes

For cases on want of prosecution, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7610–7615.

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Cases referred to

Birkett v James [1977] 2 All ER 801, HL (refd)

Genisys Integrated Engineers Pte Ltd v Pati Sdn Bhd [2012] MLJU 290, HC (folld)

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Grovit and others v Doctor and others [1997] 2 All ER 417, HL (refd)

TM Feroze Khan & Ors v Meera bin Hussain TM Mohamed Mydin [2000] 1 MLJ 321, FC (refd)

Legislation referred to

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Rules of the High Court 1980 O 34

Chevalier Ambiga (Mohd Rizal with her) (Bahari & Bahari) for the plaintiff.
R Vinayaga (Skrine) for the defendant.

Hamid Sultan J:

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[1] This is my judgment in respect of the defendant's application to strike out the plaintiff's action for want of prosecution.

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[2] Numerous affidavits have been filed to justify each party's argument, and in that process, merits of the case were also canvassed. In an application for want of prosecution, the focus should only be on the issue of delay. The court should not be burdened with irrelevant issues and numerous affidavits, and in this case, nearly eight affidavits have been filed.

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[3] I have requested the deputy registrar to prepare a chronology of summary of minutes of court and that chronology is marked as encl 53.

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[4] The cases parties have relied on are set out in the annexure to the judgment.

THE BRIEF FACTS

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[5] The writ was filed on 10 August 2007 and the plaintiff applied for an interlocutory injunction to restrain the defendant from dealing with lands charged to the defendant as security for loan to the plaintiff. That application for injunction was dismissed on 13 November 2008. The plaintiff did not seek

- A case management directions immediately to set down the matter for trial or obtained a stay of proceeding for any legitimate reasons. Subsequently, the plaintiff was wound up on 3 December 2009. The plaintiff only obtained sanction on 16 January 2012. There were also other related suits going on which have nexus to the parties to this action and not to the action itself. This distinction must be kept in mind when dealing with the issue of delay.
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[6] Learned counsel for the plaintiff relies heavily on the decision of *TM Feroze Khan & Ors v Meera Hussain bin TM Mohamed Mydin* [2000] 1 MLJ 321 and summarises the principles as follows:

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- (1) the default has been intentional and contumelious; or
 - (2) there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and such delay will give rise to a substantial risk to a fair trial of the issues in the action or is likely to cause serious prejudice to the defendants.
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And, inter alia, submits as follows:

- (4.) The defendant has alleged in the striking out application that since the dismissal of the plaintiffs' application for an interlocutory injunction on 13 November 2008, there was inaction on the part of the plaintiffs to set the matter down for trial.
 - (5.) Therefore, the plaintiffs humbly submit that the striking out application falls within the second limb of the test laid down in *TM Feroze's* case.
 - (6.) At this juncture, the plaintiffs refer to the chronology of events which is attached herewith as Annexure A to this submission. My Lord will observe from perusing the chronology of events, that since November 2008 parties have been continuously involved in various related suits and winding up petitions against the two plaintiff's which resulted in various appeals at both the Court of Appeal and the Federal Court.
 - (7.) In the *TM Feroze* case, the Federal Court in dealing with similar facts held as follows:
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... Whether a delay of over three months is inordinate and inexcusable depends on the facts and circumstances of each particular case. In the instant case, the delay, in our view, had been adequately explained and is not unreasonable. There existed (and still exists) two actions in tandem (ie, the originating summons by the first defendant and the writ action by the plaintiffs) each with claims that are intricately related to those in the other. That being so, the steps taken in the plaintiffs' writ action ought not be viewed in isolation but have to be considered against the backdrop of the events taking place in the 1st defendant's originating summons. At the time the pleadings in the writ action were deemed to be closed, the plaintiffs had already filed the application seeking to intervene in the first defendant's originating summons, and the application was yet to be heard. Considering that one of the reliefs

sought in the plaintiffs' writ action was for a declaration that the trust deed dated 2 February 1968 and the memorandum of transfer (transferring the property to the first defendant himself as trustee) were void, we do not think it unreasonable that the plaintiffs chose to wait for the outcome of their application before proceeding further with their writ action. To an extent, the fact that the judge subsequently, in granting the plaintiffs leave to intervene in the originating summons, had also directed the plaintiffs to apply for consolidation of the two actions lends support to the reasonableness of the stand of the plaintiffs to await the outcome of their application to intervene and to set aside the vesting order. Admittedly, this application of the plaintiffs, though filed on 13 March 1993, was, for reasons unknown to us, not finally disposed of by the court till 30 September 1995. This, however, is essentially a matter in the hands of the court or the registry. There is no reason (and, indeed, none has been advanced) why the plaintiffs should be blamed for it. We are therefore of the view that the alleged delay from 22 June 1995–30 September 1995 cannot be said to be inordinate and inexcusable. 30 September 1995–30 March 1996 ...

[7] I have read the application, affidavits and submission of the parties in detail. I am grateful to learned counsel for the comprehensive submission on the facts and law. I do not wish to repeat the same save to deal with the core issues. After having given much consideration to the submission of the learned counsel for the plaintiff, I take the view that the defendant's application must be allowed. My reasons, inter alia, are as follows:

- (a) in the instant case, the writ was filed in 2007 and interlocutory application was dismissed in 2008. Once the application was dismissed it would have been most appropriate for the plaintiff to proceed with case management and set the matter down for trial. Such a step will be within the spirit and intent of O 34, which requires an action to be justly, expeditiously and economically disposed of. In the event for any reason whatsoever the plaintiff is not able to proceed with the matter, the plaintiff ought to have filed an application for stay of proceedings and it is at the discretion of the court to make appropriate orders as it deems fit. In the instant case, both steps were not taken by the plaintiff and no reason was given for not doing so (a copy of my judgment in *Genisys Integrated Engineers Pte Ltd v Pati Sdn Bhd*, [2012] MLJU 290 (HC), was given to both parties);
- (b) in a recent case of *Genisys Integrated Engineers Pte Ltd v Pati Sdn Bhd*, [2012] MLJU 290 (HC) (yet unreported), I have considered the issue of delay and abuse of process of court in relation to want of prosecution, O 34 of the Rules of the High Court 1980 and inherent jurisdiction of court to strike out the matter. I have, inter alia, made the following observation:

A [10] ...

B (a) It is trite that: (i) the underlying principle in striking out for want of prosecution is that a plaintiff who has commenced an action against a defendant must comply with the prescribed rules of practice to prosecute his action expeditiously; (ii) a judge has a discretionary power to strike out an action for want of prosecution if either the default has been intentional and contumelious, or the plaintiff has been guilty of inordinate and inexcusable delay in prosecuting his claim and such delay gives rise to a substantial risk that it is not possible to have a fair trial, or is likely to cause or to have caused serious prejudice to the defendant irrespective of whether the prejudice affects the actual conduct of the trial; (in) and there is no rule of law to deprive the courts of the power to exercise their discretion to strike out an action for want of prosecution, no matter what the conduct of the defendant may have been, though the conduct is a relevant factor to be taken into account by a judge in exercising his discretion (see *Vasudevan v T Damudaran & Anor*; *Negara Properties Sdn Bhd v Akitek Bersekutu Malaysia (sued as a firm) & Ors*).

E (b) It is also trite that the court has inherent jurisdiction to strike out any cause or matter for any justifiable reasons within the norms of procedural jurisprudence and practice. More so now under O 34 of the Rules of the High Court 1980 which requires the court to deal with such issues at case management stage itself to ensure just, economical and expeditious disposal of the case (see *Charles Forte Investment Ltd v Amanda* [1963] 1 Ch D 240; *Chip Chong Sawmill Co Sdn Bhd & Ors v Chai Khium Fui* [1978] 2 MLJ 24). I must say here that any form of delay may amount to abuse in the present system of 'tracking' and case management and the general undertaking given by the Chief Justice to the public that any suit in the court filed will be disposed of within 9–12 months.

G (c) there has been much development in this area of jurisprudence in England, after Lord Woolf's report 'Access to Justice' in respect of civil justice system in England and Wales. Lord Woolf, inter alia, was very critical of any form of delay which hinders just, economical and expeditious disposal of the case. In *Grovit and others v Doctor and others* [1997] 2 All ER 417, the House of Lords had an opportunity to consider the jurisprudence relating to 'want of prosecution', and the often quoted case of *Birkett v James* [1977] 2 All ER 801, where Lord Diplock set out the test in the following manner:

I The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, eg disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will

give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.

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The House of Lords in *Grovit's* case also considered the criticism in relation to the second limb ie that the delay has to cause 'serious prejudice' and also the emergence of the procedural change after Lord Woolf's report, and held that:

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The court had power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied. Accordingly, since the commencement and continuation of proceedings with no intention of bringing them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to establish want of prosecution by showing that there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant. It followed, on the facts, that the deputy judge had been fully entitled to strike out the action. The appeal would therefore be dismissed.

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- (d) the test applied to strike out for want of prosecution under the court's inherent jurisdiction as advocated by the House of Lord in *Grovit's* case has now been widely applied in England as reported in a number of decisions and it is not just limited to the principles as set out in *Birker's* case. The courts always have the inherent jurisdiction to strike out an action for abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied;

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- (e) in the Malaysian context, all solicitors are aware of the tracking system and the obligation for court as well as parties to justly, expeditiously and economically dispose of the case. With O 34 in place, any form of delay in the present tracking system and the general undertaking given by the Chief Justice to the public that any suit in court filed will be disposed of within 9–12 months, must be seen to be an abuse of process of court;

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- (f) in the instant case, I agree with the submission of the defendant which, inter alia, reads as follows:

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(28.) We therefore submit that the delay is inordinate and inexcusable and, as explained hereinbefore, that the defendant has been prejudiced by the delay because of their restructuring in October 2011. Furthermore, the plaintiff raises allegations of fraud relating to events occurring six or more years ago.

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(29.) By reason of our submission that the plaintiff filed this action only to facilitate encl 4 and that they lack seriousness and bona fides, we submit that the plaintiff's delay was also intentional and contumelious.

A (g) in addition, it is also my finding that the plaintiff has not demonstrated
in their affidavits that they have made all reasonable attempts to
prosecute this action. The delay also demonstrates that the plaintiff has
no intention of bringing the action to a conclusion. In such
B circumstances, as I have advocated in *Genysis*, the delay amounts to an
abuse of process and the action ought to be dismissed in exercise of court's
inherent jurisdiction. It is now for the apex court to set clear guidelines in
this area of jurisprudence taking into consideration O 34, fast track
system and the undertaking of the chief justice to the public, at an
C opportune moment.

[8] For reasons stated above, I allow the defendant's application prayer 1. On
the issue of costs, I take the view that it is a fit and proper case not to make any
order as to costs.

D I hereby order so.

Application allowed with no order as to costs.

Reported by Kohila Nesan

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